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No. 83-620

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bouie v. *City of Columbia*, 378 U.S. 347 ..... 5, 6, 7, 8, 10

Bronston v. *United States*, 409 U.S. 352 4

Commissioner v. *Wilcox*, 327 U.S. 404 .... 8, 9

Douglas v. *Buder*, 412 U.S. 430 6

Ehlert v. *United States*, 402 U.S. 99 ..... 9, 10, 11

Friedman v. *United States*, 374 F.2d 363 ..... 7, 12

James v. *United States*, 366 U.S. 213 8

Lewis v. *United States*, 445 U.S. 55 11

Marks v. *United States*, 430 U.S. 188 ..... 6, 7, 10, 12

McElroy v. *United States*, 455 U.S. 642 2

Memoirs v. *Massachusetts*, 383 U.S. 413 7

Miller v. *California*, 413 U.S. 15 ..... 7, 12

Perrin v. *United States*, 444 U.S. 37 10

Rabe v. *Washington*, 405 U.S. 313 6

Scarborough v. *United States*, 431 U.S. 563 2

Teamsters v. *United States*, 431 U.S. 324 2

United Air Lines, Inc. v. *McMann*, 434 U.S. 192 2

Page

Cases—Continued:

United States v. *Adler*, 380 F.2d 917, cert. denied, 389 U.S. 1006 6

United States v. *Bramblett*, 348 U.S. 503 2

United States v. *Brecht*, 540 F.2d 45, cert. denied, 429 U.S. 1123 10

United States v. *Camara*, 451 F.2d 1122, cert. denied, 405 U.S. 1074 ..... 9, 10

United States v. *Clifford*, 426 F. Supp. 696 4

United States v. *Dahlstrom*, 713 F.2d 1423, petition for cert. pending, No. 83-1297 11

United States v. *Ehrlichman*, 379 F. Supp. 291 4

United States v. *Goodheim*, 651 F.2d 1294, reh'g denied, 664 F.2d 754 10-11

United States v. *Jenkins*, 420 U.S. 358 10

United States v. *Kirkpatrick*, 446 U.S. 1371 10

United States v. *Lambert*, 501 F.2d 943 6

United States v. *Mercado*, 478 F.2d 1108 ..... 9, 10, 11

United States v. *Polizzi*, 493 F.2d 570 ..... 9, 10, 11

United States v. *Pomponio*, 511 F.2d 953, cert. denied, 423 U.S. 874 10

Page

Cases—Continued:

United States v. *Poutre*, 646 F.2d 685 4

United States v. *Seregos*, 655 F.2d 33, cert. denied, 455 U.S. 940 ..... 9, 10

United States v. *Wasserman*, 504 F.2d 1012 .....

Constitution and statutes:

U.S. Const. Amend. XIV (Due Process Clause) 5, 7

Travel Act, 18 U.S.C. 1952 10

18 U.S.C. 1001 ..... 1, 2, 3, 4, 5, 6, 12

18 U.S.C. 1623(a) 5

18 U.S.C. 1623(e) 5

Miscellaneous:

H.R. 2013, 98th Cong., 1st Sess. (1983) 3

Note, *Criminal Law-Federal Fraud and False Statements Act-Federal Bureau of Investigation Covered*, 14 Wayne L. Rev. 642 (1968) 3

S. 1437, 95th Cong., 1st Sess. (1977) 2, 3

S. 1630, 97th Cong., 1st Sess. (1981) 2, 3

S. Rep. 95-605 (Pt. 1), 95th Cong., 1st Sess. (1977) 3

S. Rep. 97-307, 97th Cong., 1st Sess. (1981) .. 2

2A C. Sands, *Sutherland Statutory Construction* (4th ed. 1973) 3

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1. We showed in our opening brief (at 12-23) that in common, everyday usage the word "jurisdiction" means simply the power to exercise whatever authority one has been granted. Although respondent quarrels over the plain meaning of "jurisdiction," he does not dispute the maxim that "the legislative purpose is expressed by the ordinary meaning of the words used." Resp. Br. 7 (citations omitted).[1] Accordingly, if we are correct about the plain meaning of the words contained in Section 1001, resort to the

[1] While we acknowledged (Br. 14-15) that the making of monetary awards, the granting of governmental privileges and the promulgation of administrative determinations constitute one form of jurisdiction, even respondent does not contend that this restrictive definition of "jurisdiction" alone constitutes the "ordinary meaning" of the word.

legislative history is unnecessary.[2] In any event, as we showed in our opening brief (at 23-31), the history of Section 1001 provides no basis whatever for the Eighth Circuit's refusal to apply the statute to false statements made to the FBI and Secret Service. Moreover, respondent's reliance (Br. 29-30) on legislative activities that took place more than 40 years after the critical language was added to the statute for "validat[ion]" of the Eighth Circuit's view is wholly misplaced. Not only is post-enactment legislative history generally accorded little weight (see *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977); *Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977)), but the particular history relied on by respondent, if anything, indicates that Congress did not intend the restrictive construction of Section 1001 that the Eighth Circuit has imposed.

Legislation was introduced in both the 95th and 97th Congresses that would have made clear that it is a violation of Section 1001 to volunteer intentionally false information to a federal law enforcement officer. See S. 1630, 97th Cong., 1st Sess. §1343 (1981); S. 1437, 95th Cong., 1st Sess. §1343 (1977). Contrary to respondent's suggestion (Br. 29-30 & n.18), the legislative history of both bills reveals that the Senate deemed them necessary not because it viewed current Section 1001 as not reaching the conduct at issue, but rather to correct what it perceived to be the erroneous, unduly restrictive construction that had been placed on it by

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[2]For the same reason, respondent's heavy reliance (Br. 17-19) on the rule of lenity is entirely misplaced. *McElroy* v. *United States*, 455 U.S. 642, 659 (1982); *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977); *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955) (footnote omitted) ("[t]hat criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

the Eighth Circuit. See S. Rep. 97-307, 97th Cong., 1st Sess. 401-408 (1981); S. Rep. 95-605 (Pt. 1), 95th Cong., 1st Sess. 370-376 (1977).

Nor does Congress's failure to have enacted either bill suggest that it agrees with the Eighth Circuit's view. In both cases, the proposed amendment of Section 1001 was part of a more extensive, controversial revision of the entire federal criminal code. There is not a shred of evidence in the relevant legislative history that Congress's failure to enact either S. 1437, the Criminal Code Reform Act of 1977, or S. 1630, the Criminal Code Reform Act of 1981, was due to any dissatisfaction with the proposed clarification of the false statements law. This case thus illustrates dramatically why, as even respondent acknowledges, legislative *in*action generally is viewed as a "poor beacon" to follow in construing a statute. Resp. Br. 29, quoting 2A C. Sands, *Sutherland Statutory Construction* §49.10 (4th ed. 1973).[3]

2. Respondent also makes several policy related arguments (Br. 19-24, 32-35) that he contends show a legislative intent to exclude from the coverage of Section 1001 false statements made to law enforcement officers. Since these same factors were relied on by the court of appeals, we responded to most of them in our opening brief (at 31-39). Accordingly, we add only a brief further reply here.

Significantly, the logical result of accepting these arguments of respondent would be the repeal of Section 1001, not merely limitation of its application to regulatory agencies. See generally Note, *Criminal Law-Federal Fraud and*

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[3]For this same reason, the absence from the currently pending proposed revision of the federal criminal code, H.R. 2013, 98th Cong., 1st Sess. (1983), of any amendment to the false statements statute (Resp. Br. 30 n.18) sheds no light on the question whether Congress, in 1934, intended the statute to cover intentionally false statements volunteered to the FBI or Secret Service.

False Statements Act-Federal Bureau of Investigation Covered, 14 Wayne L. Rev. 642, 648-650 (1968). For example, respondent suggests (Br. 34-35) that Section 1001 should not be applied to false statements made to law enforcement officers because, since the statute does not require that such statements be in writing, a defendant charged under Section 1001 cannot make meaningful use of the *Bronston* defense.[4]

But even assuming the correctness of the decisions that permit a defendant in a Section 1001 prosecution to raise a *Bronston* defense (see note 4), one in respondent's position could make no use of the defense, since the charges against him were based on concededly *volunteered* statements, not on answers given in response to questioning. Moreover, if the *Bronston* defense were to be made available to defendants charged under Section 1001, it would be equally available to defendants charged with making false statements to regulatory agencies as to defendants who are alleged to have made false statements to investigatory agencies; neither statements made to regulatory agencies nor statements made to investigatory agencies must be in writing in order to be cognizable under the statute. Accordingly, respondent's *Bronston* argument provides no basis for construing Section 1001 to reach only false statements made to regulatory agencies.

Furthermore, there is no substance to respondent's concern (Br. 23) that defendants who are charged under Section 1001 with making false statements before a court of law will

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[4]In *Bronston* v. *United States*, 409 U.S. 352 (1973), the Court held that a perjury conviction cannot be based on an answer, given under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication. Some lower courts have extended the benefit of *Bronston* to defendants charged under Section 1001. See *United States* v. *Poutre*, 646 F.2d 685, 687-688 (1st Cir. 1980); *United States* v. *Clifford*, 426 F. Supp. 696, 701-703 (E.D. N.Y. 1976); *United States* v. *Ehrlichman*, 379 F. Supp. 291 (D.D.C. 1974).

be deprived of the protection of the "two-witness rule," to which, he asserts, they would be entitled if they were charged with perjury. In the first place, as we noted in our opening brief (at 36-37), every court that has considered the issue has refused to apply Section 1001 to false statements made during judicial proceedings on the ground that the phrase "department or agency," as used in the statute, applies to the federal judiciary only with respect to its housekeeping or administrative functions, not with respect to judicial proceedings themselves. Moreover, even assuming that Section 1001 does apply to false statements made in the context of judicial proceedings, a defendant in such a prosecution would not be deprived of any procedural protection that routinely attaches to a defendant charged with perjury before a court of law. In 1970, Congress eliminated the "two-witness" requirement with respect to prosecutions for perjury committed before a court or grand jury. See 18 U.S.C. 1623(e).[5]

3. Finally, respondent contends (Br. 36-39) that even if the Court should adopt the construction of Section 1001 that we urge, its decision nevertheless should not be applied to him because the conduct with which he was charged was not criminal in the Eighth Circuit at the time he committed it. This argument also lacks merit.

Respondent mistakenly relies on a series of decisions beginning with *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). *Bouie* held that the Due Process Clause precluded the conviction of two black college students for refusing to leave an "all-white" lunch counter where, prior to the conduct at issue, South Carolina's criminal trespass statute had

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[5]In addition, the maximum penalty provided by Section 1623(a) for perjury committed before a court or grand jury is the same as the maximum penalty provided for violation of Section 1001 — five years' imprisonment and a $10,000 fine.

never been construed to cover the type of conduct in which the students engaged. The Court explained (378 U.S. at 354-355; emphasis added):

> When a[n] * * * *unforeseeable* state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

See also *Marks* v. *United States*, 430 U.S. 188 (1977); *Douglas* v. *Buder*, 412 U.S. 430 (1973); *Rabe* v. *Washington*, 405 U.S. 313 (1972).

These decisions are inapposite to the present case. In the first place, as the Court noted in *Bouie*, 378 U.S. at 349 n.1, the South Carolina criminal trespass statute on its face prohibited only the "[e]ntry on lands of another after notice prohibiting same." The statute thus gave the defendants in that case "no reason even to suspect that [their refusal to *leave* the lunch counter would] be retroactively brought within it by an act of judicial construction" (*id.* at 352). By contrast, as we showed in our opening brief (at 11-23), respondent's conduct falls clearly within the plain language of Section 1001.

Moreover, at the time respondent made his false crime reports to the FBI and the Secret Service, the Eighth Circuit was the only court of appeals to have held that Section 1001 does not cover such conduct. As we discussed in our opening brief (at 9-10), two other courts of appeals — the Second Circuit in *United States* v. *Adler*, 380 F.2d 917, cert. denied, 389 U.S. 1006 (1967), and the en banc Fifth Circuit in *United States* v. *Lambert*, 501 F.2d 943 (1974) — had held precisely to the contrary. In these circumstances, a

decision by this Court to the effect that respondent's conduct was within the statutory prohibition surely would not be "unforeseeable."[6]

Here, respondent makes no claim that he actually relied on the Eighth Circuit's decision in *Friedman* v. *United States*, 374 F.2d 363 (1967), when he engaged in the charged conduct. There is no justification for refusing to apply a concededly correct construction of a statute to a defendant because of the existence of a prior, erroneous interpretation of the statute, in the absence of a finding that the defendant relied on the prior construction. Particularly in a case such as this one, where the alleged misconduct is manifestly antisocial, there is no unfairness in applying the statute so as to reach the defendant's conduct in the absence of any showing that he relied on the existence of prior precedent to the contrary.[7]

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[6]Respondent's reliance on *Marks* v. *United States*, 430 U.S. 188 (1977), likewise is unavailing. The defendants in that case were convicted of transporting obscene materials in interstate commerce in violation of a federal statute. Their allegedly unlawful conduct, however, occurred before this Court had rendered its decision in *Miller* v. *California*, 413 U.S. 15 (1973), which "announced new standards for 'isolat[ing] "hard core" pornography from expression protected by the First Amendment' " (430 U.S. at 190, quoting 413 U.S. at 29). Relying in part (430 U.S. at 192) on *Bouie*, the Court held that the Due Process Clause precluded application of the *Miller* standards to the defendants in *Marks*. In *Marks* the Court was concerned that the defendants' conduct might have been permissible under then prevailing *Supreme Court* precedent (*i.e.*, *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966) (plurality opinion)). By contrast, as noted in the text above, the pertinent law was unsettled at the time of respondent's misconduct, and it was thus entirely foreseeable that the making of false crime reports might subject him to criminal liability.

[7]Respondent's assertion (Br. 38) that his reliance vel non on *Friedman* is irrelevant because "there is no indication in the present record that [he] was ever warned by an agent of the F.B.I. or the Secret Service that he could be liable for making fictitious statements to those agencies" is entirely misdirected. Warnings by the victim agencies has never

The opinions for five Justices of this Court in *James* v. *United States*, 366 U.S. 213 (1961), support the position we urge here. *James* held that embezzled funds are includible in the gross income of the embezzler in the year in which they are misappropriated, thus overruling the prior decision in *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946). In view of the existence of the prior precedent, however, three Justices held that James' conviction for "willfully" attempting to evade taxes could not stand. 366 U.S. at 221-222 (opinion of Warren, C.J.). Notwithstanding that *Wilcox* was a decision of this Court, not, like *Friedman*, a court of appeals' decision on an issue concerning which the circuits are divided, three other Justices were of the view that, not only should *Wilcox* be overruled, but James' conviction should have been affirmed in the absence of any showing that he in fact

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been deemed an element of the offense described in Section 1001. Moreover, as we showed in our opening brief (at 11-23), the statute on its face provides ample indication that it includes conduct such as the false crime reports made by respondent. Respondent also relies (Br. 38-39) on this Court's suggestion in *Bouie*, 378 U.S. at 355-356 n.5, that "[t]he determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants." But that observation by the Court, made apparently in response to a suggestion by the City that the defendants "at one point testified that they had intended to be arrested" (378 U.S. at 355 n.5), was only dictum. The Court went on to explain (*id.* at 356 n.5) that any such statement by the defendants did not necessarily indicate an understanding by them that their conduct was violative of the criminal trespass statute on which they ultimately were convicted: "[T]he record is silent as to what [the defendants] intended to be arrested for, and in fact what they *were* arrested for was not trespass but breach of the peace — on which charge they were not convicted. Hence there is no basis for an inference that [the defendants] intended to be arrested *for violating this statute*, either by remaining on the premises after being asked to leave or by any other conduct." See also *James* v. *United States*, 366 U.S. 213, 241 (1961) (opinion of Clark, J.); *id.* at 241-245 (opinion of Harlan, J.); *id.* at 223-225 (opinion of Black, J.).

had placed "bona fide reliance" on the prior decision. 366 U.S. at 241 (opinion of Clark, J.); *id.* at 241-245 (opinion of Harlan, J.). Moreover, although Justices Black and Douglas concurred in the judgment of reversal on the ground that *Wilcox* should not be overruled, they "dissent[ed] from the way the majority of the Court overrules *Wilcox*. If the statutory interpretation of 'taxable income' in *Wilcox* is wrong, then James is guilty of violating the tax evasion statute for the trial court's judgment establishes that he embezzled funds and wilfully refrained from reporting them as income" (*id.* at 223).[8]

The majority of the courts of appeals that have considered the question agree with this view. See *United States* v. *Seregos*, 655 F.2d 33 (2d Cir. 1981), cert. denied, 455 U.S. 940 (1982); *United States* v. *Polizzi*, 493 F.2d 570 (3d Cir. 1974); *United States* v. *Mercado*, 478 F.2d 1108 (2d Cir. 1973); *United States* v. *Camara*, 451 F.2d 1122 (1st Cir. 1971), cert. denied, 405 U.S. 1074 (1972). *Polizzi, Mercado* and *Camara* all addressed the question whether *Ehlert* v. *United States*, 402 U.S. 99 (1971) — which held that an individual who does not declare conscientious objector status until after he receives his induction notice may be prosecuted for draft evasion without having received a status hearing by his local draft board — should be applied retroactively in circuits where it overturned existing law. In upholding such retroactive application, the First, Second, and Third Circuits emphasized that the defendant in each of those cases had made no showing that he in fact was aware of or had relied upon the pre-*Ehlert* case law in his circuit and that, in any event, any such reliance would have been wholly unjustified in view of the widespread disagreement

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[8]The remaining Justice, Justice Whittaker, also disagreed with the Court's overruling of *Wilcox* without expressing any opinion on the prospectivity of the Court's ruling (*id.* at 248-258).

among the courts of appeals prior to this Court's decision in *Ehlert*. See *United States* v. *Polizzi*, 493 F.2d at 573; *United States* v. *Mercado*, 478 F.2d at 1111; *United States* v. *Camara*, 451 F.2d at 1124-1125. See also *United States* v. *Kirkpatrick*, 446 F.2d 1371, 1373 (10th Cir. 1971).[9]

Likewise, the defendant in *Seregos* had been convicted under the Travel Act, 18 U.S.C. 1952, on the basis of a violation of New York State's commercial bribery statute. The question presented by the case was whether that conviction violated due process because the underlying misconduct had occurred before *Perrin* v. *United States*, 444 U.S. 37 (1979), held that the Travel Act extended to commercial bribery and at a time when the prevailing law in the Second Circuit was to the contrary. See *United States* v. *Brecht*, 540 F.2d 45 (1976), cert. denied, 429 U.S. 1123 (1977). The court of appeals found no due process violation under *Bouie* or *Marks* because, it held, the language of the Travel Act appears on its face to cover commercial bribery under state law. 655 F.2d at 36. Nor, in the court of appeals' view (*ibid.*), could *Perrin* be viewed as an "unforeseeable" judicial expansion of the scope of the Act, in light of *United States* v. *Pomponio*, 511 F.2d 953, cert. denied, 423 U.S. 874 (1975), in which the Fourth Circuit had held, prior to Seregos' misconduct, that the statute applied to commercial bribery.

As respondent notes (Br. 37), the Ninth Circuit has reached a position at odds with the above line of authority. *United States* v. *Goodheim*, 651 F.2d 1294, reh'g denied,

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[9]This Court noted the *Mercado* decision in *United States* v. *Jenkins*, 420 U.S. 358, 363 n.5 (1975), but expressed no opinion on its validity.

664 F.2d 754 (1981).[10] In that case, the court reversed the defendant's convictions on several gun control charges and remanded for a hearing to determine whether there was a constitutional defect in the proceedings underlying the predicate conviction, because Ninth Circuit law at the time of the offenses was that such a defect would be a defense to gun control charges — a view subsequently rejected by this Court in *Lewis* v. *United States*, 445 U.S. 55 (1980).[11] For the reasons already stated, we believe that *Goodheim* was incorrectly decided.[12]

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[10]Indeed, the Ninth Circuit has gone so far as to hold that a defendant may not be convicted of willfully aiding and abetting the preparation of fraudulent income tax returns in the absence of prior decision condemning the precise "tax shelter" program alleged, notwithstanding the lack of any precedent affirmatively approving the scheme, *United States* v. *Dahlstrom*, 713 F.2d 1423 (1983), petition for cert. pending, No. 83-1297 (filed Feb. 6, 1984).

[11]In a petition for rehearing addressed to the panel in *Goodheim*, the government pointed out that the court of appeals' decision conflicted with *United States* v. *Polizzi*, *supra*, and *United States* v. *Mercado*, *supra* (discussed at pages 9-10, *supra*). In denying the petition in *Goodheim*, the court of appeals distinguished *Polizzi* and *Mercado* on the ground (664 F.2d at 756 & n.2) that this Court had granted certiorari in *Ehlert* before the misconduct charged in each of those cases had been committed. This distinction is specious; in our view, invocation by a defendant of favorable case law prevailing in his own circuit is no less justified in the face of conflicting decisions in other circuits than in the face of this Court's having indicated a willingness to review one of those conflicting decisions. (Indeed, if anything, in view of the fact that it was the *defendant's* petition for certiorari that was granted (over the government's opposition) in *Ehlert*, the expectation might have been that this Court was inclined to agree with the defendant's position.)

Largely because the proceedings in *Goodheim* were still interlocutory, the Solicitor General declined to petition for a writ of certiorari in that case. The government prevailed on the remand hearing in the district court, whereupon Goodheim's conviction was affirmed by the court of appeals. 686 F.2d 776 (1982).

[12]Respondent's further reliance (Br. 37 & n.23) on *United States* v. *Wasserman*, 504 F.2d 1012 (5th Cir. 1974), is misplaced. That case presented the identical question that this Court subsequently decided in

Were respondent to claim that he actually relied on *Friedman* in deciding to make his false statements to the FBI and the Secret Service, a more colorable claim might be presented. He has not done so, and because the indictment was dismissed prior to trial, it would be premature for this Court to pass on the merit of such a claim. All that need be decided is that Section 1001 may properly be applied in accordance with this Court's interpretation to one who has not actually relied on a contrary prior interpretation by the court of appeals.

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1984

Marks, viz., whether the standards articulated in *Miller* v. *California*, *supra*, should be applied retroactively; the Fifth Circuit, like this Court, answered in the negative (see 430 U.S. at 189 n.1). As we explained in note 6, *supra*, the question of the retroactivity of *Marks* is quite different from the question presented here.